No. 18-1520

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MINERVA DAIRY, INC., et al.,

Plaintiffs - Appellants,

v.

SHEILA HARSDORF,
in her official capacity as the Secretary of
the Wisconsin Department of Agriculture,
Trade and Consumer Protection, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin
Honorable James D. Peterson, District Judge

APPELLANTS' REPLY BRIEF

JOSHUA P. THOMPSON
ANASTASIA P. BODEN
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Plaintiffs - Appellants
Minerva Daily, Inc., et al.

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Appellate Court No: 18-1520

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Minerva Dairy, Inc. and Adam Mueller

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Attorney's Printed Name: Anastasia P. Boden

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Address: 930 G Street, Sacramento, CA 95814

Phone Number: (916) 419-7111 Fax Number: (916) 419-7747

E-Mail Address: ABoden@pacificlegal.org

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SUMMARY OF ARGUMENT

Minerva Dairy[1] is a small, family-owned dairy located in Ohio that has produced its artisanal products since 1894. APP002-003. Its butter does not taste like the generic commodity butter made by other producers—nor does it seek to. The company has distinguished itself and built its success based on its Amish-style slow churned butter which results in a creamier consistency and richer flavor than traditional table butter. APP001, APP003, APP008-009. But Wisconsin threatens to shut it out of the market, because the state requires every batch of butter to go through a government-mandated taste test and be sold using special labels that disclose whether it meets the state's subjective preferences for butter. Wis. Admin. Code ATCP § 85.06(2); Wis. Stat. § 97.176(1). This is prohibitively expensive for Minerva Dairy. And because grading was created for and is associated with commodity butter standards, it would ruin the brand equity the company has established as an "artisanal" producer over the past 100 years.

The requirement is also unconstitutional. Wisconsin's butter grading law violates the Due Process Clause of the Fourteenth Amendment because it arbitrarily deprives butter makers of their right to sell indisputably safe and healthful butter in Wisconsin unless that butter carries a grade. The Department[2] contends that grading is necessary to "inform" consumers about how butter tastes. But the evidence shows that, at best, butter grading informs consumers of whether the Department

[1] For ease of reference, Minerva Dairy refers to both appellants: Minerva Dairy and Adam Mueller.

[2] Defendants are sued individually pursuant to *Ex Parte Young*, but are referred to collectively as "the Department."

considers butter "pleasing" according to its subjective preferences—which is outright arbitrary. At worst, butter grading affirmatively deceives consumers.

Though the rational basis test is lenient, it requires courts to consider the evidence at hand to determine whether a challenged law actually serves a legitimate purpose. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). The Department has not offered any evidence in support of its contentions that butter grading protects the public; it offers only unsubstantiated statements and analogies to irrelevant laws. Minerva Dairy, by contrast, has offered evidence that rebuts any conceivable legitimate interest for the butter grading law. The law therefore fails even rational basis review.

The butter grading law also violates the Equal Protection Clause, because the Department has failed to justify its decisions to differentiate between graded and ungraded butters and to discriminate amongst products regulated by the Department. The Department argues that it has chosen to exempt other commodities from the mandatory butter grading requirement because it has a special interest in protecting the dairy industry. Opp. Br. at 43-44. But protectionism is not a legitimate state interest. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013). And even if it were, the Department's explanation fails because cheese makers are arbitrarily exempt. Wis. Admin. Code ATCP § 87.04; APP043.

Finally, the butter grading law violates the dormant Commerce Clause because the burdens on interstate commerce outweigh its putative local benefits. The Department's arguments to the contrary ignore the harms to butter makers' brand

equity, as well as the significant costs to train, license, and employ butter graders on staff. Against this the Department offers speculative and unsupported benefits in promoting commerce. That speculation fails. In addition, Minerva Dairy is entitled to a declaratory ruling that the Department's prior discriminatory policy of licensing only Wisconsin-based graders is unconstitutional.

ARGUMENT

I. EVEN RATIONAL BASIS REVIEW OF ECONOMIC REGULATIONS REQUIRES COURTS TO LOOK AT THE EVIDENCE

The Department relies heavily on the fact that the rational basis test is deferential. It essentially argues that it can evade judicial scrutiny altogether by simply giving a reason for the law even if that reason is uncorroborated by any evidence. *See* Opp. Br. at 32. Indeed, it argues that Minerva's contrary evidence is irrelevant. *Id.* ("[T]here is . . . never a role for evidentiary proceedings."). The Department concludes that, even though the butter grading law may be "improvident," and "unwise," it must be upheld simply because the Department has mustered up a justification. *Id.* at 24. But the rational basis test does not allow the government to evade judicial scrutiny by simply stating that the law furthers some purpose. Instead, it requires deference to the legislature while permitting plaintiffs to submit evidence that proves either that the ends are illegitimate or that the means do not actually relate to any legitimate ends.[3] The Supreme Court and Circuit Courts across the country have struck down numerous laws under this standard.

[3] Though the Department suggests that separation of powers requires courts to accept the government's justifications despite any contrary evidence, *id.*, separation of powers actually

While it's true that the rational basis test is "lenient," the Department overstates the test's deferential nature, going so far as to suggest that the Supreme Court "abandoned" substantive due process altogether in the 1930s. *See* Opp. Br. at 22. But that's simply not so. Instead the Court merely reformulated the rational basis test and established a rebuttable presumption in favor of the challenged law that can be overcome through the presentation of evidence. *See, e.g.*, *Carolene Prods.*, 304 U.S. at 152 ("the existence of facts supporting the legislative judgment is to be presumed . . . *unless in the light of the facts* made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis"). While courts must start from the assumption that the law is constitutional, they must then look to the evidence to determine whether the law actually serves a legitimate purpose. *Zobel v. Williams*, 457 U.S. 55 (1982) (in equal protection challenge rational basis requires that justifications for challenged laws "find some footing in the realities of the subject"). Thus, while the test is lenient, it is not insurmountable. *Borden's Farm Prods. v. Baldwin*, 293 U.S. 194, 209 (1934) (rational basis is "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault"); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (rational basis review is not "toothless").

The Department's claim that the government "does not need to present actual evidence" to satisfy rational basis is only partially true. As the case they cite for that

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requires courts to ensure that laws are constitutional and to strike unconstitutional laws down. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803).

proposition makes clear, the state may rely on "*rational* speculation,"[4] but any such speculation can be overcome by contrary evidence. *Monarch Beverage Co., Inc. v. Cook*, 861 F.3d 678, 683 (7th Cir. 2017) (emphasis added). Where the evidence on both sides is equal, courts should defer to the government. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995). But in cases like this, where the state presents *no* evidence and the challenger presents evidence contradicting any conceivable rationale for a law, the challenger must prevail.

Using this deferential, but meaningful, standard, the Supreme Court has repeatedly struck down economic regulations under the rational basis test. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (disposing of government's proffered justifications and striking down zoning ordinance); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (rejecting government's justifications for denial of food stamps); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989) (striking down requirement that a person own real property in order to serve on government board); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 344-45 (1989) (holding that rule for assessing property was irrational); *Williams v. Vermont*, 472 U.S. 14, 15 (1985) (ruling that exemption to use tax on cars was arbitrary); *Schware v. Bd. of Bar Examiners of the State of N.M.*, 353 U.S. 232, 249 (1957) (striking down application of qualification for practicing law); *see also* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the*

[4] As the evidence shows, the Department's speculation is anything but rational.

1971 Term Through Romer v. Evans, 32 Ind. L. Rev. 357 (1999).[5] These cases establish that rational basis review for economic regulations is alive and well in the Supreme Court and demonstrate that laws (economic or otherwise) must be struck down if there is no legitimate purpose for them.

The Department also suggests that rational basis review for economic regulations under substantive due process no longer exists in the Seventh Circuit. Opp. Br. at 23 n.4. But Minerva only reads three of those opinions, *Nat'l Paint*, 45 F.3d at 1127-30; *Gosnell v. City of Troy, Ill.*, 59 F.3d 654, 657-58 (7th Cir. 1995), and *Mid-Am. Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 291-92 (7th Cir. 1995), all by the same author, as indicating anything of the sort. The other cases cited by the Department routinely employ substantive due process review while acknowledging its leniency. That being said, even the Seventh Circuit case that is most skeptical of substantive due process, *Nat'l Paint & Coatings Ass'n*, 45 F.3d at 1130, concludes that "[w]hen assessing an economic regulation," a court "must employ the rational-basis test."

In sum, the Fourteenth Amendment protects the right to earn a living free of arbitrary or irrational government interference. *See Meyer v. Nebraska*, 262 U.S.

[5] Since 1970, plaintiffs have won at least 21 cases at the Supreme Court under the rational basis test. In addition to those already discussed above, other cases include: *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985); *Metro Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55, 64 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977); *James v. Strange*, 407 U.S. 128 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Mayer v. City of Chicago*, 404 U.S. 189, 190-91 (1971).

390, 399 (1923) (Fourteenth Amendment protects "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."). Though courts analyze economic regulations under the rational basis test, which is lax, the test does not permit the government to pursue outright arbitrariness, and it does not allow the state to head off a constitutional challenge by asserting, without any evidence, its rationality. Instead, the burden rests with the plaintiff to negate conceivable rationales for the law and prove that it is irrational. Minerva Dairy has done so in this case.

II. BUTTER GRADING DOES NOT SERVE ANY LEGITIMATE ENDS

A. Butter Grading Does Not Inform Consumers

The Department argues that the butter-grading requirement promotes the state's interest in informing consumers about the butter that they purchase. But as Minerva argued in its opening brief, Op. Br. at 17, the butter grading law does not actually achieve that purpose.[6] First, grading consists of a composite test that takes into account several different characteristics. This means that a butter's grade does not communicate that a butter has a certain flavor, a particular consistency, a given color, or a designated saltiness. Instead, it communicates that a butter has, on the

[6] And in any event, informing consumers about the state's subjective preferences amounts to pure arbitrariness and is not a legitimate state interest. Op. Br. at 14; *see also supra* Section II.F.

whole, earned a score that places it somewhere on the government's pleasing spectrum. That's not only meaningless to consumers it's outright confusing, because two butters with the same grade can have different flavors. APP044; APP065. Purchasers have no way to anticipate what a AA butter tastes like, because it might be comprised of any number of combinations of flavors, consistencies, colors, or saltiness that can earn a butter an AA grade. Conversely, two butters with the same flavor, consistency, color, or saltiness can have different grades. *Id.* The only thing that butter grading signifies then is that a butter has the right mix of attributes to qualify it as either "highly pleasing," "mildly pleasing," or otherwise pleasing according to the state's palate.[7]

But even that doesn't communicate anything to consumers, because a consumer has no reason to anticipate the government's subjective preferences about butter. As the Department admits, consumers may disagree with the state's preferences. APP068. That's evidenced by the popularity of artisanal brands like Kerrygold and Minerva Dairy which don't taste like "commodity" butter. When the state first enforced the butter grading law against Kerrygold, Wisconsinites were travelling out of state to stockpile contraband Kerrygold butter.[8] Like Kerrygold,

[7] Moreover, people do not taste things the same way so even if butter grading supposedly indicated that a butter tasted "mildly salty," that would not mean that the butter actually tastes mildly salty to the consumer. *See, e.g.*, Scientific American, *Super-Tasting Science: Find Out If You're a "Supertaster"!,* https://www.scientificamerican.com/article/super-tasting-science-find-out-if-youre-a-supertaster/.

[8] Chicago Tribune, *Ban on Irish Butter in Wisconsin Sends Shoppers Across State Lines*, http://www.chicagotribune.com/news/local/breaking/ct-wisconsin-butter-law-met-20170301-story.html.

Minerva Dairy butter is loved because of its unique taste and consistency[9] yet it would not receive an AA grade because it doesn't taste like commodity butters. Grading, then, does not inform consumers that a butter is "pleasing" to the consumer—it informs consumers that a butter is pleasing to the government. And there's no reason to assume that consumers know whether the government thinks that "utensil," "mottled," "cooked," or "ragged boring" butter tastes good or bad or agrees with that conclusion. In fact, the evidence shows that even the most informed consumers don't even understand the meaning of these terms.[10]

Moreover, companies are permitted to downgrade, APP044, meaning that purchasers cannot rely on a grade to inform them about the butter's actual characteristics. The Department says the purpose of permitting downgrading is to benefit producers. Opp. Br. at 39. That may be so, but it undercuts the very reason for the disclosure and all but ensures that a grade effectively means nothing.

The Department has done nothing to rebut this evidence except to 1) claim that it is "self-evident" that grading informs consumers, Opp. Br. at 29, 2) allege that "[i]t is perfectly reasonable to conclude that consumers will alter their purchasing behavior in light of a butter's grade, whether or not they understand the technical specifics of the grading process, since the grade comports with dominant consumer

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[9] *See, e.g.*, Renee Kelly, The Kansas City Star, *Taste Test of Eight Butters Shows There is a Difference*, Apr. 25, 2014, https://www.kansascity.com/living/liv-columns-blogs/chowtown/article346850/Taste-test-of-eight-butters-shows-there-is-a-difference.html.

[10] The evidence shows that consumers have very little knowledge about what goes into butter grading. Even the Department's own experts could not explain the meaning of various grading terms. *See* APP066-067; APP073-074; APP107. If the experts don't know what those terms mean grading terms must be indecipherable to the average consumer.

preferences," *id.* at 34, and 3) to suggest that this law must be upheld so as not to throw other mandatory disclosure laws into jeopardy. *Id.* at 35. But as demonstrated by Minerva Dairy's evidence, it is not "self-evident" at all that butter grading informs consumers. If anything, it's contrary to common sense. And even assuming that consumers will alter their behavior in light of a butter's grade, that doesn't support the proposition that grading communicates anything or conforms to consumer preferences; it supports the proposition that the government is attempting to pick winners and losers in the marketplace based on its own arbitrary taste preferences—which is unconstitutional. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d 215 (economic protectionism is not a legitimate state interest).

The Department is also wrong to analogize to other types of grading or mandatory disclosures, because Wisconsin's butter grading law is entirely distinguishable from those laws. For example, the Department compares butter grading to mandatory disclosures regarding a product's country of origin or laws requiring labels to include the amount of "saturated fat per serving." But butter grading does not require businesses to disclose the butter's origin, ingredients, fat content, healthfulness, or characteristics. Arguably, butter grading does not require companies to disclose anything factual—or even meaningful. Instead, it requires businesses to disclose whether, considering several subjective factors, the state considers it "pleasing." Thus, the Department's analogies are inapt. The only way butter grading can be compared to, say, a of country-of-origin disclosure, is if such a disclosure required companies to grade their product's country of origin based on a

multi-factored test that took into account the country's politics, GDP, level of pollution, and whether the country allowed child labor, and then made the companies disclose whether, all these things considered, the state considered the product's country of origin as "pleasing."

A decision striking down Wisconsin's butter grading law would have no bearing on mandatory disclosure laws that require companies to disclose information "about a particular product trait," *id.* at 29, or that allow consumers to "know[] what products or services are composed of," *id.* at 31, because butter grading does not require buttermakers to disclose whether their butter is "yellow," or "salty," or "sweet," or "creamy," or contains certain ingredients, or is high in fat or salt content. Instead, it requires buttermakers to disclose whether their butter meets an esoteric set of government preferences, which is uninformative to consumers, and ultimately arbitrary. *See* Op. Br. at 14.

Thus, the Department's unsupported and conclusory statements that defy common sense and its fear-mongering regarding disclosure laws fall short of showing that butter grading is rationally related to informing consumers about butter. Minerva has shown that the butter grading is not only "improvident" and "unwise" it is irrational and unconstitutional.

B. Butter Grading Does Not Ensure That Butter Meets a Consumer's Expectations

The Department also contends that butter grading ensures that butter meets consumer expectations and therefore prevents the harm that would occur if consumers were to purchase a butter that they did not enjoy. But butter grading

cannot actually effectuate that goal. First, a grade does not correlate to any quality in a butter; a consumer cannot know if the butter they purchase conforms to their expectations because butters with different qualities can share the same grade. Indeed, because butters with the same grade can have different qualities, a consumer might try an AA butter and like it and once they return to the store to purchase another AA butter be caught entirely off-guard by its entirely different taste.

Second, there's no evidence that the grades correspond to the preferences of Wisconsin consumers; instead, they correspond to what the state *perceives* as the public's preferences. The Department itself acknowledged this point. APP0037; APP068-069. And the popularity of butters like Minerva Dairy and Kerrygold demonstrate that consumers do not necessarily seek the generic commodity butter flavor that Wisconsin favors. There is no one "taste" for butter that all consumers expect or demand there are many.

The only evidence the Department has in support of its argument that consumers "expect" AA butter is that higher scoring butters tend to have the highest sales, although they do not actually point to any evidence showing that this is true. *See* Opp. Br. at 33 (stating, without citation, that higher scoring butters sell better and citing to pp. 9-10 of the brief which also provides no evidence). But even assuming that highly graded butters have higher sales, that doesn't prove that consumers expect butter to taste like AA grade butter; it only shows that the grading system is influencing the market and channeling sales toward butters that Wisconsin favors. Moreover, that argument is circular because it allows the state to set

expectations and then to argue that those expectations justify the expectations' existence in the first place. *See Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) (rejecting government's "consumer expectations" rationale for self-titling law because it was "circular"); Op. Br at 21-22.

At its core, Wisconsin's "consumer expectations" argument rests on the assumption that products must conform to dominant tastes; otherwise a person will be harmed if they try something new. But the law does not ensure that a butter conforms to a consumer's expectations. And even if it did, consumers are not harmed by the entry of new tastes and flavors into the marketplace—they are benefitted. Consumer expectations are dynamic. Though Folgers may be one of the most well-known and popular brands of coffee, it would be absurd to suggest we should grade all coffees against Folgers. That would have prevented new entrants to the marketplace, like Starbucks or Caribou Coffee, who were not always as pervasive and who were once thought to taste "different." When the government establishes its arbitrary preferences as the standard, it edges artisanal products out of the market. That's not only arbitrary, it's protectionist and unconstitutional. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d 215 (striking down economic regulation under substantive due process because economic protectionism is not a legitimate state interest); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (same).

C. Butter Grading Does Not "Ensur[e] Honest Presentation" of the Product

According to the state, butter grading also "ensur[es] honest presentation" of butter. Opp. Br. at 29, 33. But the Department has no evidence that the law actually furthers that purpose; it "believe[s]" the benefits are there, but it is "unaware" of any actual evidence. *Id.* at 4. In the decades that ungraded butters have been sold in the state, the Department cannot show that a single consumer has *ever been misled* by purchasing ungraded butter. APP069. The Department cannot even explain what it means when it says selling ungraded butter is deceptive. There is nothing inherently deceptive about selling ungraded butter. It's only deceptive to sell ungraded butter if the butter maker markets the butter contrary to its qualities—which is otherwise prohibited by Wisconsin law. APP068-0069.

The Department appears to argue that a butter could taste so poorly it could be considered "deceptive" to market it as "butter." Opp. Br. at 33. But as Minerva explained in its Opening Brief, any arguments about "deceptiveness" are circular. *See* Op. Br. at 21, 22 n.8. Wisconsin already has a standard of identity law that allows butter makers to market their products as "butter" so long as they meet certain requirements. Wis. Stat. § 97.01. Butter doesn't then become "deceptive" just because someone doesn't like it. S*ee Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017) ("[W]hat consumers believe to be" the attributes of a given commodity "does not make [a seller's truthful representation] misleading."); *Mason v. Florida Bar*, 208 F.3d 952, 957 (11th Cir. 2000) ("Unfamiliarity is not synonymous with misinformation.").

D. Butter Grading Does Not Pertain to the Quality of Butter

Although the Department now argues that butter grading informs consumers about a butter's quality, the statute only pertains to "quality" in terms of subjective preference. The government may prefer AA butters' taste, look, or feel, but that doesn't mean AA butter is better quality. If the government preferred Folgers coffee, that wouldn't mean that Folgers is *better*—it would simply mean the government liked its taste. Imposing a grading standard may encourage butter producers to meet that standard but that doesn't mean the law encourages producers to produce better butter; it just ensures that all butter tastes the same.

E. Butter Grading Does Not "Promote Commerce"

The government contends that butter grading "promotes commerce" by "providing a common measure of the quality of goods, allowing for more efficient comparison shopping." Opp. Br. at 20, 30. It further states that, "like laws outlawing the sale of 'adulterated' goods," the grading requirement "protect[s] the integrity of [ ] products so as not to depress the demand for goods." *Id.* But as explained above, butter grading does not communicate anything to consumers or ensure that butter is higher "quality." It doesn't allow for more efficient comparison shopping because not all AA butters are alike. And it doesn't protect the integrity of products because it does not pertain to quality. In sum, its purported interest in "commerce" is the same as its purported interest in promoting information and high quality butter, and the evidence shows that the law does not actually rationally relate to those purposes.

F. Butter Grading Amounts to Pure Arbitrariness

Having disposed of the Department's proffered rationales, Minerva Dairy submits that the true purpose and effect of the butter grading statute is to deem products "good" or "bad" based on the government's whim, which amounts to pure arbitrariness. In its opening brief, Minerva analogized to a law requiring blankets to be graded according to a government-imposed cuddly scale, or requiring a pen to be graded according to a writeability scale, or requiring clothing to be graded according to a fashionableness scale. Op. Br. at 15. Such laws are wholly arbitrary and therefore violate due process. In response, the Department argues that butter grading is different because it requires companies to "disclos[e] relevant product information to consumers that is *not discoverable before purchase*," and because the standards supposedly "ar[ose] solely through market forces." Opp. Br. at 34.

But the government's attempts to distinguish butter grading fail. First, you can't know a blanket's cuddliness or a pen's writeability before its purchase, both because you can't always try these products in advance and because the test doesn't pertain to objective factors. That is, even if you could write with a pen before purchasing it, you could not know in advance whether the government thought it was pleasing—and that's all that grading communicates.

Second, despite changing preferences in the world of butter, the standards have been imposed and maintained by government forces. Nevertheless, "writeability" and "fashionability" standards could also ostensibly arise through "market forces,"—they could be gleaned from fashion trends and fashion bloggers or

best-selling pen brands—but that wouldn't change the fact that it's arbitrary for the state to mandate grading based on those standards.

III. THE BUTTER GRADING LAW VIOLATES THE EQUAL PROTECTION CLAUSE

The butter grading law also violates the Equal Protection Clause. The Department's argument to the contrary and the decision below rest on the same false premise: that Minerva's "argument under the Equal Protection Clause [ ] is virtually identical to its Due Process Clause theory." Opp. Br. at 40. There are two different inquiries under the two provisions. *See Merrifield*, 547 F.3d at 992. The due process inquiry asks whether there is a rational basis for a law's existence. *Id.* at 986. The equal protection inquiry asks the court to determine whether there is a rational basis for the Department's unequal treatment of similarly situated entities. *Id.* at 992. The butter grading law fails proper equal protection scrutiny in two ways: it irrationally discriminates among butters and it irrationally discriminates among commodities regulated by the Department.

A. The Law Irrationally Discriminates Among Butters

The butter grading law arbitrarily differentiates between graded and ungraded butter. To justify its discrimination against ungraded butter, the Department offers two interests: "consumer welfare and market based reasons." Opp. Br. at 40. Neither withstand even rational basis scrutiny.

The Department cannot show how "consumer welfare" and "market-based reasons" justify the disparate treatment between graded and ungraded butter. Moreover, butter grading does not actually promote consumer welfare. It has nothing

to do with public health or safety; the Department has repeatedly declined to defend the butter grading law on that basis.[11] Instead, grading supposedly promotes the state's interest in providing consumers with information about butter. *See* Opp. Br. at 27-29. Yet the butter grading law fails to advance that interest. The evidence in this case shows that neither consumers nor the Department's own declarants understand what the butter grades mean. APP 067; APP074; APP107. That is hardly surprising given that the butter grades are derived from a combination of dozens of factors—most of which are inherently subjective. *See* Wis. Admin. Code ATCP § 85.03; APP044; APP065. If anything, the Department's interest in consumer information is better served by ungraded butter. Because butter makers are permitted to (and often do) display a grade lower than the one for which it qualifies, APP044, graded butter is more likely to provide consumers with inaccurate information.

The Department's "market-based reasons," Opp. Br. at 40, fare no better. The Department argues that the butter grading law could "conceivably promote commerce," Opp. Br. at 29, but there's no evidence that the butter trade would suffer without grading. Given that grading threatens to shut valuable producers like Minerva out of the Wisconsin market, the trade would arguably be better promoted if the grading law were abolished. There's also no evidence that the butter trade is suffering in states where no grading law exists.

[11] Nor could it. Ungraded butter is sold in almost every state in the country. Minerva's Opening Br. at 30. There would be ample evidence of the health hazards of eating ungraded butter if doing so were unsafe. There is none.

The Department says that grading promotes commerce because it ensures that butters meet a standard of purity. Opp. Br. at 30. But the standard of purity for butter is found in another *unchallenged* statute, and Minerva meets that standard. *See* Opp. Br. at 3-4. The Department also invokes the USDA's promotional materials on butter grading. *See* Opp. Br. at 29. But the existence of the USDA's optional grading program fails to support the existence of Wisconsin's mandatory regime. If anything, it undercuts the Department's arguments—because the USDA did not find the program urgent enough to make mandatory.

Because there is no rational reason to differentiate between graded and ungraded butters, the butter grading law fails the rational basis test under equal protection scrutiny. *See City of Cleburne, Tex.*, 473 U.S. at 440.[12]

B. The Law Irrationally Discriminates Among Commodities Regulated by the Department

The butter grading law also violates the Equal Protection Clause because it discriminates among commodities regulated by the Department. The Department requires mandatory grading for butter but makes grading for other commodities, including dairy products like cheese, optional. Wis. Admin. Code ATCP § 87.04; APP043.

[12] The Department argues that that *Cleburne* is inapposite because it only applies when the disadvantaged class was "irrationally feared by a majority of voters." Opp. Br. at 42. But the principle of *Cleburne* is that a law fails rational basis scrutiny when it only advances irrational fear, *i.e.,* when it doesn't advance any legitimate interest at all. As the Department seems to admit, "rational" must mean "more than democratic preference." Opp. Br. at 42 (citing *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998)).

In *Merrifield*, 547 F.3d at 990-92, the Ninth Circuit struck down an economic regulation where the law's exemptions undercut the government's asserted justification. *See* Minerva's Opening Brief at 28-29. As Minerva argued in its opening brief, the Department's exemptions undercut its purported rationale for the law because consumers are less familiar with exotic cheeses, which come in significant varieties, than butter.

The Department now justifies its discriminatory treatment by pointing to its "particular concern for dairy-product quality," Opp. Br. at 43, but that justification fails rational basis scrutiny for multiple reasons. First, grading doesn't promote quality; it promotes ensuring that butter conforms to government-preferred commodity standards. Second, the Department claims that it favors the dairy industry because that is the largest segment of Wisconsin agriculture. Opp. Br. at 43. According to the Department, however, "Wisconsin ranks second in the nation in butter production . . . and first in cheese production." Opp. Br. at 44. Third, protectionism is not a legitimate state interest. *St. Joseph Abbey*, 712 F.3d at 222-23. Given the Department's stated rationales for the butter grading law, it is irrational to exempt cheese from the mandatory grading requirement. The butter grading law therefore fails equal protection scrutiny.

IV. THE BUTTER GRADING LAW VIOLATES THE DORMANT COMMERCE CLAUSE

A. Minerva Is Entitled to a Ruling That the Department's Past, Discriminatory Policy Is Unconstitutional

Minerva Dairy also challenged the butter grading law as a violation of the Dormant Commerce Clause. In its complaint, Minerva Dairy alleged that the butter grading law was discriminatory—since the Department only licensed in-state butter graders—and also that the law violated the Dormant Commerce Clause under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because the "putative local benefits" significantly outweigh the burdens to interstate commerce. *See* APP012-APP013. Prior to filing the lawsuit, counsel for Minerva Dairy phoned the Department to inquire whether the Department allowed Wisconsin-licensed butter graders to work out-of-state. The Department confirmed that they did not permit out-of-state grading.[13]

Due to its plainly discriminatory policy, Minerva Dairy sought a preliminary injunction to enjoin the Department's facially discriminatory enforcement of the butter grading law. APP026-028. Soon thereafter, the Department abandoned its discriminatory interpretation and allowed out-of-state butter graders to hold a Wisconsin butter grading license. APP111. The trial court therefore denied the preliminary injunction, in part, because the Department abandoned its facially unconstitutional policy during the briefing on the preliminary injunction motion.

[13] Minerva Dairy submitted two declarations during briefing on the preliminary injunction that attest to this conservation and the Department's prior interpretation. *See* Dist. Ct. ECF Nos. 12 and 22. Although not included in the Appendix, they form the record in this case and may be considered by the Court. *See* FRAP 30(a)(2).

APP028 (noting a lack of irreparable harm because "*as of this moment*, Minerva Dairy employees can become licensed Wisconsin butter graders.") (emphasis added).

On motion for summary judgment, Minerva Dairy asked the Court to declare that the Department's prior policy was unconstitutional because it discriminated against out-of-state commerce. In *Palmetto Properties, Inc. v. County of DuPage*, this Court explained that the government's abandonment of unconstitutional conduct during the pendency of a case does not deprive the court of jurisdiction to declare that (past) policy unconstitutional. 375 F.3d 542, 550 (7th Cir. 2004); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Nevertheless, the district court dismissed Minerva Dairy's claim holding that it failed to produce sufficient evidence to show the Department's prior interpretation was unconstitutional. APP125-126.

As Minerva Dairy argued in its opening brief on appeal, the lower court got the standard backwards. Op. Br. at 41-42. Where a statute or regulation discriminates against out-of-state firms, the state bears the burden of proving constitutionality. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980); *Maine v. Taylor*, 477 U.S. 131, 138 (1986). By showing that the Department's interpretation facially discriminated against out-of-state businesses, Minerva Dairy met its burden, and the Department was required to provide evidence to justify its discriminatory policy. It declined to do so, and Minerva Dairy is entitled to a declaration that the Department's prior policy was unconstitutional.

Now on appeal, the Department does not try to defend the lower court's reasoning. Instead, the Department argues—for the first time—that it (might) never have had an unconstitutional policy and, in any event, the Court should accept its assurances that it will never ever reinstitute its facially discriminatory policy. Opp. Br. at 51-52. Neither defense has merit.

The Department rests its argument that no discriminatory policy existed on a fanciful reading of Mr. Haase's deposition. During deposition, Mr. Haase, speaking on behalf of the Department,[14] conceded that prior to Minerva Dairy's lawsuit, the Department had an unwritten policy of precluding butter graders from grading out-of-state. APP111. The Department seizes on Mr. Haase's use of the word "may" arguing that this word transforms his admission into equivocation. Opp. Br. at 51. From this point of "strength," it then proceeds to walk through the remainder of Mr. Haase's deposition supplying a gloss that cannot be found in the transcript—adding words like "hypothetical," "possibly nonexistent," "speculated," etc.

"May," of course, does not only mean "possibility," it is also colloquially used as an admission. For example, a statement like, "They *may* have won the game, but we'll get them next time" admits the (undeniable) point in contention. Similarly here, Mr. Haase admits that the Department *may* have had an unwritten policy even if it did not have a written policy. APP111 (Haase unequivocally explaining that he "would have to agree" to the existence of an unwritten policy.). The remainder of the transcript speaks for itself. Mr. Haase explains that the policy existed, because the

[14] Mr. Haase was deposed pursuant to FRCP 30(b)(6) and was therefore speaking on behalf of the Department.

statute and regulation are ambiguous and permitted such an interpretation. *Id.* The Department's belated attempt to confuse the Court about the content of Mr. Haase's Deposition should be rejected outright.[15]

Lastly, the Department curiously cites *Friends of the Earth*, 528 U.S. 167, to support its assertion that the Court should accept its assurances that it won't return to its prior understanding of the butter grading law. The citation is puzzling because *Friends of the Earth* stands for precisely the opposite conclusion. According to the Supreme Court in *Friends of the Earth*, the standard the Department must satisfy is "stringent." *Id.* at 189. The Department bears the burden of showing that subsequent events "made it absolutely clear" that its unconstitutional behavior is unlikely to recur. *Id.*; *see also Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir. 2002) (the government bears an extremely heavy burden to show that the illegal conduct will not recur); *Palmetto Properties*, 375 F.3d at 550 (same).

The Department's citation to *Frank v. Walker*, 819 F.3d 384, 388 (7th Cir. 2016) is off point and unhelpful. *Frank* did not concern a government's voluntary cessation of unconstitutional conduct. The quotation relied upon by the Department concerns only whether a decision by the Wisconsin Supreme Court may have provided the plaintiffs the relief they are seeking. In other words, the government did not cease its unconstitutional conduct voluntarily, it was ordered to do so by another court. *Id.* at 388 (citing *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014)). In any event, this Court still allowed the plaintiffs to pursue their substantive claims

[15] Moreover, as explained above, there was evidence submitted in the court below concerning the Department's prior interpretation. *See supra* fn. 13.

remanding the case to the district court with the uncontroversial admonition that the lower court should consider plaintiffs' claims in light of the intervening Wisconsin Supreme Court decision. The case does not deal with the voluntary cessation doctrine at all and has no relevance here whatsoever. Accordingly, Minerva Dairy is entitled to a declaration that the Department's past enforcement of the butter grading law violated the Constitution's dormant Commerce Clause.

B. Minerva Preserves Its *Pike* Claim for Appeal

Turning to Minerva Dairy's claim that the butter grading law violates the Dormant Commerce Clause under *Pike*, this Court weighs the "burden on interstate commerce against the nature and strength of the state or local interests at stake." *Id.* (citing *Nat'l Paint*, 45 F.3d at 1132). In the Seventh Circuit, however, *Pike* balancing is only invoked where a facially nondiscriminatory law also imposes "disparate effects" on interstate commerce.[16] *See Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017). Because a hypothetical artisanal butter maker located in Wisconsin would face similar costs to Minerva Dairy, it is not clear that the law disparately affects out-of-state businesses as required by this Court's precedent.[17]

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[16] While the law of this Court holds that *Pike* scrutiny is only invoked where there are disparate effects on interstate commerce, *see Park Pet Shop*, 872 F.3d at 500, that additional hurdle has been met with criticism within the circuit, *id.* at 504 (Hamilton, J., dissenting in part), and is not required in other circuit courts of appeals. *See, e.g., U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000); *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1254 (11th Cir. 2012).

[17] In its opening brief, Minerva Dairy argued that the butter grading law disparately affects out-of-state businesses because out-of-state businesses need to become USDA-certified in order to ship butter interstate. Op. Br. at 32-34. In its Opposition Brief, the Department explained that there is only a requirement to become USDA-certified to ship *graded* butter interstate. The Department is correct. Minerva Dairy produces its butter in a USDA-certified plant because it produces cheese in the same facility, and cheese facilities must be certified to ship interstate. There is no requirement that Minerva Dairy's facilities become USDA-

Minerva Dairy raises its *Pike* claim only to the extent it must do so to preserve the issue for rehearing by the full court *en banc* and the Supreme Court.

DATED: July 11, 2018.

Respectfully submitted,

JOSHUA P. THOMPSON
ANASTASIA P. BODEN
WENCONG FA

By s/ Anastasia p. Boden
ANASTASIA P. BODEN

Attorneys for Plaintiffs-Appellants
Minerva Dairy, Inc., et al.

certified in order to sell its artisanal butter interstate. Minerva Dairy apologizes to the Court for its error.

FORM 6.

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DATED: July 11, 2018.

s/ Anastasia P. Boden
ANASTASIA P. BODEN

Attorney for Plaintiffs-Appellants
Minerva Dairy, Inc., et al.

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ANASTASIA P. BODEN

Attorney for Plaintiffs-Appellants
Minerva Dairy, Inc., et al.